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No. 02-5664

In the Supreme Court of the United States

CHARLES THOMAS SELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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This brief responds to the Court's order of February 28, 2003, directing the parties to file supplemental briefs addressing "the jurisdiction of this Court and of the Court of Appeals in this case, see *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)." The government submits that the court of appeals had jurisdiction over petitioner's appeal under 28 U.S.C. 1291 and the collateral order doctrine, see *Cohen*, *supra*, and that this Court has jurisdiction to review the court of appeals' decision under 28 U.S.C. 1254(1).

INTRODUCTION

In this case, petitioner challenged in the court of appeals the order of the district court affirming the magistrate judge's ruling that "substantive due process does not preclude the forcible administration of anti-psychotic medications to [petitioner] in this case." J.A. 339. As a result of the district court's decision, the government was entitled to seek the restoration of petitioner's competence to stand trial by administering medically appropriate antipsychotic drugs. The district court stayed its order for 14 days pending the

filing of a notice of appeal, J.A. 355, and the court of appeals later continued that stay, see Docket Entries for 4/17/02 and 3/18/02, No. 01-1862 (8th Cir.). In the court of appeals, petitioner relied on the collateral order doctrine for jurisdiction. Pet. C.A. Br. vii. The government did not challenge that assertion, and the court of appeals affirmed without discussion of jurisdiction. J.A. 356-382.

Petitioner's challenge has two elements. First, petitioner raises a substantive due process and First Amendment claim that an order of involuntary medication would violate his rights to bodily integrity, liberty, freedom of thought, and privacy. Pet. Br. 24-43; Pet. C.A. Br. 24-32. Second, petitioner contends that an order of involuntary medication would violate his fair trial rights under the Fifth and Sixth Amendments. Pet. Br. 43-50; Pet. C.A. Br. 48-50. To the extent that petitioner is challenging the government's authority to administer antipsychotic medication under substantive due process and First Amendment principles, his appeal is properly brought under the collateral order doctrine. To the extent that petitioner asserts that, if he were restored to competence through antipsychotic medication and brought to trial, the trial would violate his fair trial rights, the district court did not reach a final decision on that issue, and the collateral order doctrine is inapplicable. See J.A. 351-352 (district court explains that the issue of possible "prejudice [to] the defense at trial" from the effects of medication is a "serious issue," but "[t]he issue is, in effect, premature. Until [petitioner] is treated with anti-psychotic medication, its effects on his demeanor cannot reasonably be assessed. * * * [T]he Court here states that if medication is administered and the defense presents argument and evidence concerning its adverse effect on [petitioner's] ability to defend himself, the Court will give the issue careful consideration.").

ARGUMENT

THE COURT OF APPEALS HAD JURISDICTION UNDER THE COLLATERAL ORDER DOCTRINE

Congress has given the courts of appeals jurisdiction over "final decisions of the district courts." 28 U.S.C. 1291. Congress has also authorized this Court to review by writ of certiorari cases "in" the court of appeals. 28 U.S.C. 1254(1). See *Hohn* v. *United States*, 524 U.S. 236, 246-247 (1998). Generally, a "final decision[]" requires that the district court have entered an order that concludes the litigation "and leaves nothing for the court to do but execute the judgment." *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 521 (1988). "In criminal cases," the final judgment rule "prohibits appellate review until after conviction and imposition of sentence." *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 798 (1989). Nevertheless, in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), this Court recognized that Section 1291 should be applied in a practical manner and that some rulings of a district court constitute "final decisions" even if they are not "final judgments." *Stack* v. *Boyle*, 342 U.S. 1, 12 (1951) (Jackson, J., concurring) ("While a final judgment always is a final decision, there are instances in which a final decision is not a final judgment."). As each of the courts of appeals that has addressed the issue has concluded, an order authorizing the government to administer antipsychotic medication in order to render a defendant competent to stand trial fits within the collateral order doctrine, because it resolves an issue—whether the government may overcome the defendant's constitutional interests in resisting such an order—that finally determines an important question that is separate from the merits of the defendant's guilt or innocence on the criminal charges, and that is effectively unreviewable on appeal from a final judgment in the criminal case. U.S. Br. 10 n.5.

A. The Collateral Order Doctrine Permits Review Of Narrow Categories Of Final Decisions Before Resolution Of The Case On The Merits

In *Cohen*, this Court determined that appellate review is permitted under Section 1291 when a district court's decision before final determination of the case conclusively resolves an issue that is "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. at 546. Applying that principle, *Cohen* permitted review of the question whether a state-law requirement that a plaintiff post security in a stockholder derivative action was applicable when the action was brought in federal court by virtue of diversity jurisdiction. Since *Cohen*, the rule in that case has come to be known as the collateral order doctrine, and it has been distilled into three requirements:

> To fall within the limited class of final collateral orders, an order must (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," and (3) "be effectively unreviewable on appeal from a final judgment."

Midland Asphalt Corp., 489 U.S. at 799 (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)); accord, *e.g.*, *Johnson* v. *Jones*, 515 U.S. 304, 310 (1995); *Van Cauwenberghe*, 486 U.S. at 522. "The collateral order doctrine is best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it." *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994).

The doctrine is a "narrow" one, *Digital Equip. Corp.*, 511 U.S. at 868, that is applied with particular stringency in criminal cases, *Midland Asphalt Corp.*, 489 U.S. at 799; *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982) (per curiam) (policy against "piecemeal appellate

review * * * is at its strongest in the field of criminal law"); *United States* v. *MacDonald*, 435 U.S. 850, 853-854 (1978) ("The rule of finality has particular force in criminal prosecutions because 'encouragement of delay is fatal to the vindication of the criminal law.'"). This Court has recognized only three categories of decisions in criminal cases that are reviewable under the collateral order doctrine: the denial of a motion to reduce bail, *Stack* v. *Boyle*, *supra*, the denial of a motion to dismiss an indictment under the Double Jeopardy Clause, *Abney* v. *United States*, 431 U.S. 651 (1977), and the denial of a motion to dismiss under the Speech or Debate Clause, *Helstoski* v. *Meanor*, 442 U.S. 500 (1979).

B. The Decision Authorizing The Government To Administer Antipsychotic Medication In Order To Render Petitioner Competent To Stand Trial Is An Appealable Collateral Order

1. The district court conclusively determined that medication may be involuntarily administered

After a psychiatric evaluation of petitioner by the Bureau of Prisons Medical Center in Springfield, Missouri, conducted pursuant to 18 U.S.C. 4241(b), petitioner was determined to be incompetent to stand trial. As required by statute, the district court then committed petitioner to the custody of the Attorney General to be "hospitalize[d] * * * for treatment in a suitable facility * * * for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed." 18 U.S.C. 4241(d)(1). See *Jackson* v. *Indiana*, 406 U.S. 715, 738 (1972).

In Springfield, after a hearing pursuant to 28 C.F.R. 549.43, the Bureau of Prisons determined that involuntary antipsychotic medication was necessary and appropriate in order to treat petitioner's mental illness and to restore him

to competence. J.A. 144-145, 150. Petitioner's administrative appeal of that hearing was denied. J.A. 152-157. Relying on *United States* v. *Brandon*, 158 F.3d 947 (6th Cir. 1998), petitioner sought review of the Bureau's order in the district court that had ordered petitioner committed to the custody of the Attorney General for competence restoration under 18 U.S.C. 4241(d). Docket Entry for 7/30/99 (No. 322), No. 97-CR-290-1 (E.D. Mo.). After a hearing, the magistrate judge entered an order that the "government may involuntarily medicate [petitioner] with antipsychotic drugs." J.A. 337. The district court affirmed that determination. J.A. 354-355. Those orders conclusively permitted the government to treat petitioner with antipsychotic medication. But for the stays entered by the magistrate judge, the district court, and the court of appeals, the Bureau of Prisons medical staff would have administered medication to treat petitioner's psychotic illness and to seek to restore his competency.

Petitioner asserts a substantive due process right to resist that medication. Under *Washington* v. *Harper*, 494 U.S. 210, 221-222 (1990), an individual has "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." An order of involuntary medication with such drugs requires "a finding of overrriding justification and a determination of medical appropriateness." *Riggins* v. *Nevada*, 504 U.S. 127, 135 (1992). Although *Harper* involved a sentenced prisoner and this case involves a pretrial detainee, due process affords "at least as much protection to persons the [government] detains for trial" as it does for prisoners. *Ibid.* The order allowing the medication thus conclusively resolves that the government may override petitioner's substantive due process interests, as well as any residual First Amendment rights that petitioner may have in objection to antipsychotic medication.

In contrast, the district court's order did not conclusively resolve whether petitioner's fair trial rights would be violated by restoring his competence through antipsychotic medication. J.A. 351-353. The court took note of petitioner's arguments that antipsychotic medication would "adversely affect his ability to obtain a fair trial by altering his demeanor in a manner that will prejudice his reactions and presentation in the courtroom and/or by rendering him unable or unwilling to assist counsel." J.A. 351. But the court responded that no "unfair trial" will occur if petitioner is shown to be unable to assist counsel because such a showing "would result in a continued finding that [petitioner] is not * * * competent to stand trial." J.A. 351. The court also noted that the potential for trial prejudice was a "serious issue," but consideration of it was "premature," because, until petitioner receives antipsychotic medication, its effects on his demeanor are speculative and unknowable. J.A. 351-352. The court made clear that it would continually assess issues that may arise based on claims of trial prejudice and quoted at length from the district court's opinion in *United States* v. *Weston*, 134 F. Supp. 2d 115 (D.D.C. 2001), on the appropriate procedure that a trial court should employ to monitor claims of prejudice and to take appropriate steps to prevent it. J.A. 352-353. Consequently, the district court's tentative rulings on trial prejudice are neither practically nor legally final and cannot be the subject of collateral order review. *MacDonald*, 435 U.S. at 858 (pretrial denial of a claim under the Speedy Trial Clause is not a final rejection of the issue, because the district court must assess it based on the particular facts developed at trial).

That is not to say that consideration of whether petitioner may receive a fair trial is irrelevant to the substantive due process claim, recognized in *Harper*, that petitioner may assert in objecting to the involuntary medication order. The government's interest is in restoring petitioner to com-

petence so that he may be brought to trial. The interest in achieving an adjudication of serious criminal charges is a compelling one, U.S. Br. 19-26, but that interest would not be achieved if there were no substantial probability that a fair trial could take place if petitioner were restored to competence through antipsychotic medication. The inquiry at this juncture, before treatment is carried out, is whether, if petitioner's competence is restored through antipsychotic medication, it can be reasonably expected that he can receive a fair trial. *Id.* at 11, 18, 38; see J.A. 376 ("We note that before forcibly medicating an accused, there must be evidence that he will be able to participate in a fair trial."); *United States* v. *Gomes*, 289 F.3d 71, 82 (2d Cir. 2002) (requiring a showing, *inter alia*, that "the defendant can be fairly tried while under the medication"), petition for cert. pending, No. 02-7118 (filed Oct. 22, 2002); *United States* v. *Weston*, 255 F.3d 873, 883-886 & n.8 (D.C. Cir.) (considering fair trial concerns as they relate to "the narrow tailoring aspect of [Weston's] Fifth Amendment substantive due process argument," which requires a "predictive judgment now"), cert. denied, 534 U.S. 1067 (2001). Such an inquiry necessarily considers judicial experience with antipsychotic medication, as well the medical literature and the record in the particular case, concerning the general effects of antipsychotic medication and the capacity of medical professionals and courts to address any potential for trial prejudice.

In this case, the government's "burden" to show that a fair trial can reasonably be expected "was met," J.A. 376, by evidence that attested to the feasibility of minimizing and treating side effects of the medication that might be thought to interfere with petitioner's fair trial interests. See U.S. Br. 38-40, 48-50. More specific claims of trial prejudice (for example, claims that antipsychotic medication would interfere with a "diminished capacity" defense, see Pet. Br. 43) must necessarily await the restoration of competence. Only

at that point will it be clear what side effects, if any, have occurred, what impact they may have on the defense, and what judicial remedies may be employed. J.A. 376 ("[T]he effects of the medication on [petitioner's] competency and demeanor may properly be considered once the medication is administered."); U.S. Br. 40-43.

2. The order permitting involuntary medication resolved an important issue that is separate from the merits of the criminal prosecution

In *Abney*, this Court determined that a double jeopardy claim, by its nature, "is collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i.e.*, whether or not the accused is guilty of the offense charged." 431 U.S. at 659. The Court explained that, in raising a double jeopardy claim, "the defendant makes no challenge whatsoever to the merits of the charge against him. Nor does he seek suppression of evidence which the Government plans to use in obtaining a conviction." *Ibid.*

Here as well, the question whether petitioner may be involuntarily medicated is separate from the merits of his guilt or innocence on the charges against him of mail fraud, health care fraud, money laundering, attempted murder, and murder conspiracy. His claim that he may not be medicated does not challenge the government's right to bring those charges, nor does it contest the evidence that may be adduced. Rather, petitioner asserts a substantive due process liberty interest, as well as a First Amendment interest, in precluding the administration of medication. That claim is, if anything, more distinct from the merits of the criminal charges than the double jeopardy claim at issue in *Abney*. Resolution of a double jeopardy claim necessarily requires consideration of the particular legal theories against a defendant. Indeed, a collateral order appeal under the Double Jeopardy Clause has been held available even where the

claim at issue, if it had merit, would have required scrutiny of the sufficiency of the evidence—a matter far more tied to the merits than the involuntary medication order in this case. *Richardson* v. *United States*, 468 U.S. 317, 321-322 (1984) (even though the defendant's claim would require the court of appeals to "canvass" the trial evidence and was in that sense tied to the merits, the evidence review was "a necessary component of [the] separate claim of double jeopardy"; Court permitted the collateral order appeal, then rejected the double jeopardy theory on the merits). Similarly, a qualified immunity defense in a civil action has a significant relation to the merits of the complaint, but an order rejecting it on "an abstract issu[e] of law" is appealable under the collateral order doctrine, *Behrens* v. *Pelletier*, 516 U.S. 299, 313 (1996), because the defense, as an official's entitlement not to litigate the validity of a particular action, is "conceptually distinct" from the resolution of the case on the merits, *Mitchell* v. *Forsyth*, 472 U.S. 511, 527 (1985); *Behrens*, 516 U.S. at 309 n.3 ("the *Cohen* 'separability' component asks whether the question to be resolved on appeal is 'conceptually distinct' from the merits of the plaintiff's claim").

While petitioner's fair trial claim, in its specific application to the facts of this case, would "substantially overlap [with the] factual and legal issues of the underlying dispute," rendering that claim "unsuited" to Section 1291 review before trial, *Van Cauwenberghe*, 486 U.S. at 529 (finding forum non conveniens claims to fall outside of the collateral order doctrine); *MacDonald*, 435 U.S. at 859 (prejudice inquiry in a Speedy Trial claim is "intertwined" with "events at trial"), his substantive due process claim does not have such an overlap with the merits. That claim requires the determination whether the government's interest in seeking an adjudication of serious criminal charges outweighs the defendant's interest in avoiding unwanted treatment with antipsychotic medication. Determination of that issue is conceptually and factually distinct from the merits.

The strong policy against piecemeal appeals in criminal cases does not require a different conclusion. While most matters that arise during a criminal proceeding bear concretely and primarily on whether the defendant will receive a fair adjudication of the charges against him, the distinctive feature of petitioner's claim is its assertion of liberty and autonomy interests that are protected quite apart from their impact on the outcome or fairness of the trial.

The distinctness of the medication issue from the merits of the criminal prosecution is illustrated by the possibility of characterizing the defendant's challenge as a free-standing attack on the administrative decision by the Bureau of Prisons to medicate under its regulatory scheme, 28 C.F.R. 549.43(a)(5) ("When an inmate will not or cannot provide voluntary written informed consent for psychotropic medication, the inmate will be scheduled for an administrative hearing. * * * The psychiatrist conducting the hearing shall determine whether * * * psychotropic medication is necessary in order to attempt to make the inmate competent for trial."). If no other form of judicial review were available, the Administrative Procedure Act would supply the basis for review. 5 U.S.C. 703, 704.

In fact, however, judicial review by motion in the criminal case is the appropriate procedure. When a court in which a prosecution is pending determines that a defendant is incompetent to stand trial, "the court shall commit the defendant to the custody of the Attorney General," who is to "hospitalize the defendant for treatment in a suitable facility." 18 U.S.C. 4241(d). The court must also determine, after a reasonable period not to exceed four months, whether the defendant's hospitalization should continue "for an additional reasonable period" if there is a "substantial probability" that within that time he will attain competence. 18 U.S.C.

4241(d)(1) & (2). If the "director of the facility in which a defendant is hospitalized pursuant to subsection (d) determines that the defendant" has attained competency, the court has the further responsibility to "hold a hearing * * * to determine the competency of the defendant." 18 U.S.C. 4241(e).

Accordingly, the district court in the criminal case has comprehensive statutory responsibilities to determine whether treatment has a substantial probability of succeeding in restoring competence, and whether treatment, once administered, has succeeded in that goal. It is logical, both as an adjunct to that statutory responsibility and as a matter of judicial efficiency, to channel legal disputes about the appropriateness and constitutionality of involuntary medication to that district court, to be resolved within the framework for adjudicating competence issues under Section 4241, rather than to a court that is a stranger to the case or to a proceeding unrelated to the criminal prosecution.

The involuntary medication issue is also important enough to warrant appellate review at this juncture, *i.e.*, before the medication is administered. Antipsychotic medication is medically appropriate, and often indispensable, to treat the delusions, hallucinations, disordered thinking, and impaired rationality that characterizes psychotic illness. At the same time, the decision whether to administer such medication bears on significant liberty and autonomy interests. The issue is therefore important enough to warrant appellate review before a final judgment is entered.

3. The order is effectively unreviewable on appeal from a final judgment of conviction

The third component of the collateral order test requires distinguishing between (1) the aspect of petitioner's claim that asserts a substantive due process liberty interest and a First Amendment interest in avoiding involuntary medication and (2) the aspect that asserts that involuntary medication will deprive him of his Fifth and Sixth Amendment fair trial rights. The latter interests can be fully vindicated on a direct appeal from a conviction, and so do not support collateral order review. The former, however, would be "irretrievably lost," *Van Cauwenberghe*, 486 U.S. at 524, if pre-medication appellate review were not available.

In *Midland Asphalt*, the Court held that a defendant could not appeal, under the collateral order doctrine, a decision denying a motion to dismiss an indictment based on an alleged violation of grand jury secrecy under Fed. R. Crim. P. 6(e). 489 U.S. at 799-800. The Court explained that, if the Rule 6(e) violation could support reversal of the defendant's conviction on appeal, "it is obvious that [it is] not 'effectively unreviewable on appeal from a final judgment.'" *Id.* at 800 (quoting *Coopers & Lybrand*, 437 U.S. at 468).

This Court held in *Riggins* that because a particular order of involuntary medication was not properly supported by a sufficient government interest, the potential prejudice to the defendant's fair trial rights indicated by the record justified reversal of the conviction. 504 U.S. at 136-138. The Court explained that "[b]ecause the record contains no finding that might support a conclusion that administration of antipsychotic medication was necessary to accomplish an essential state policy, * * * we have no basis for saying that the substantial probability of trial prejudice in this case was justified." *Id.* at 138. Under *Riggins*, petitioner, if he is restored to competence by antipsychotic medication and convicted at trial, could raise on appeal a claim that his conviction should be reversed on the ground that antipsychotic medication was not justified or that it had an unduly prejudicial effect on his trial. Such a claim, if upheld on appeal, would entirely vindicate his fair trial rights under the Fifth and Sixth Amendments. See *Hollywood Motor Car Co.*, 458 U.S. at 269-270 (claim of prosecutorial vindictiveness is

adequately vindicated by reversal on appeal and provision of a new trial); *MacDonald*, 435 U.S. at 860-861 (Speedy Trial claim can be vindicated by reversal of conviction on appeal).

Review of the involuntary medication order at the conclusion of the case, however, would not vindicate petitioner's substantive due process interests. If petitioner were acquitted, he would not be able to appeal at all. And even if petitioner were convicted, review would come too late to prevent the intrusion on his liberty that petitioner claims is unjustified. The interest of petitioner in avoiding unwanted medication is lost when the medication is administered. Similarly, any constitutionally protected interest under the First Amendment cannot be vindicated after trial. As the Court has observed, the "effectively unreviewable" component of the collateral order test considers whether the order in question implicates "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *MacDonald*, 435 U.S. at 860. The order in this case satisfies that test.

It is not essential to the availability of a collateral order appeal that the defendant's underlying legal claim involve a right not be tried at all, as was the case in *Abney* and *Helstoski*. In *Stack* v. *Boyle*, the Court held that a motion to reduce bail is appealable at the time of its entry. As Justice Jackson explained in his concurrence in *Stack*, unless a order fixing bail "can be reviewed before sentence, it never can be reviewed at all." 342 U.S. at 12 (concurring opinion). Although review of bail orders is now explicitly permitted by statute, see 18 U.S.C. 3145, 3731, the reasoning underlying *Stack*'s collateral order holding is equally applicable to the substantive due process interest at stake here as well. The liberty interest in remaining at large pending trial cannot be vindicated on appeal from a final judgment. Likewise, the liberty interest in avoiding unwanted antipsychotic medication must be vindicated before the medication is administered, or not at all. That consideration satisfies the third requirement of the collateral order test. Cf. *Abney*, 431 U.S. at 662 ("[I]f a criminal defendant is to avoid *exposure* to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs.").

C. Permitting Collateral Order Review In This Case Does Not Imply That All Involuntary Medication Orders Are Subject To Plenary Review Under The *Cohen* Rule

1. Delay in collateral order appeals can have significant consequences

Review of the involuntary medication order in this case has caused significant delay in the efforts to treat petitioner in order to restore him to competence. Such delay has served neither the government's nor petitioner's interests. The delay has frustrated the government's interest in adjudicating serious criminal charges, and it has the potential to prevent adjudication of those charges at all. After the elapse of the initial four-month period of hospitalization under 18 U.S.C. 4241(d)(1), a district court can continue a person's hospitalization for "an additional reasonable period of time," provided that the court finds that there is a "substantial probability" that the defendant "will attain the capacity to permit the trial to proceed." 18 U.S.C. 4241(d)(2); see 18 U.S.C. 4247(e)(1)(A) (requiring the director of the facility in which a person is hospitalized under Section 4241 to "prepare semiannual reports" for the court that ordered the person's commitment). To date, based on the opinion of the Bureau of Prisons medical professionals that petitioner's competence can be restored through antipsychotic medication, the government has periodically requested that the district court continue petitioner's hospitalization. But the longer that an individual with delusional disorder goes untreated, the greater the possibility that antipsychotic medi-

cation may be ineffective when administered. See J.A. 165, 216. Postponing treatment may therefore prevent the restoration of competency at all. In addition, "delay may prejudice the prosecution's ability to prove its case, increase the cost to society of maintaining those defendants subject to pretrial detention," *MacDonald*, 435 U.S. at 862, and preclude closure for the victims of the offenses—an especially acute concern where, as here, a defendant is charged with trying to arrange the murder of a government agent and a prosecution witness.

The delay does not inure to petitioner's benefit either. While this appeal has been pending, petitioner has been hospitalized in a Bureau of Prisons medical center without any opportunity to resolve the criminal charges against him. Hospitalization without treatment also may impair petitioner's medical interests in having his delusional disorder effectively treated. There is no sound basis for believing that any treatment other than antipsychotic drugs will be effective, and there is no reason to believe that petitioner's condition will spontaneously improve to the point where he will regain competence.

The process of appellate review necessarily requires a certain degree of delay, and that is a concern in any case in which the collateral order doctrine applies. *Richardson*, 468 U.S. at 322. Those concerns are offset to some extent by the interest in safeguarding an important right that would otherwise evade review, and by the fact that the appeal here, as in *Richardson*, did not "interrupt or delay proceedings during the time that a jury was empaneled." *Ibid.* Nevertheless, the concerns arising from appellate delay are real.

2. Reasonable steps can minimize delay in future cases.

If this Court rules that involuntary antipsychotic medication to restore competence can be ordered based on an appropriate showing, there are measures that can and should be employed in future cases to avoid undue delay from collateral order review.

First, the central issue in this case is whether petitioner may be medicated at all consistent with his substantive due process and First Amendment rights, when the government has brought non-violent felony charges. J.A. 384 (order granting certiorari). This Court's resolution of that legal issue, if it strikes the balance in favor of permitting medication based on an appropriate showing, will remove that issue from the realm of legal claims that can support a collateral order appeal. In *Richardson*, for example, the Court entertained a collateral order appeal to resolve the question whether the Double Jeopardy Clause required a court, after granting a mistrial when the jury has been unable to return a verdict, to determine whether the government's evidence was sufficient to convict. The Court rejected that claim on the merits. It then stated that "[i]t follows logically from our holding today that claims of double jeopardy such as petitioner's are no longer 'colorable' double jeopardy claims which may be appealed before final judgment." 468 U.S. at 326 n.6. Similarly, to the extent that the decision in this case resolves the overarching constitutional issue, an appeal to relitigate that holding would be not be colorable.

Second, future appeals addressed to the specific application of a general legal rule permitting involuntary treatment with antipsychotic medications in order to restore a defendant to competence can and should be dealt with in a more summary fashion than the appeal in this case. To the extent that a defendant in such a case challenges the factual findings of the district court as clearly erroneous, review can be conducted expeditiously and without undue taxing of appellate resources. To the extent that the defendant challenges the lower court's exercise of discretion, review can be similarly abbreviated, assuming that collateral order review

is available at all. Cf. *Stack*, 342 U.S. at 6 (distinguishing between motions to reduce bail that "invoke[d] the discretion of the District Court setting bail within a zone of reasonableness" and motions that challenged the bail order on statutory and constitutional grounds, and expressing no view on collateral order appeals of the former class); *Cohen*, 337 U.S. at 547 ("If the right were admitted or clear and the order involved only an exercise of discretion as to the amount of security, a matter the statute makes subject to reconsideration from time to time, appealability would present a different question."). And to the extent that a defendant brings only plainly unfounded objections to an order of involuntary medication, "[i]t is well within the supervisory powers of the courts of appeals * * * to weed out frivolous claims." *Behrens*, 516 U.S. at 310 (quoting *Abney*, 431 U.S. at 662 n.8).

All of these considerations should allow courts of appeals to give "expedited treatment" to future collateral order appeals from orders of involuntary medication. *Abney*, 431 U.S. at 662 n.8; cf. *United States* v. *Weissberger*, 951 F.2d 392, 397 (D.C. Cir. 1991) (noting the possibility of special panels to give expedited treatment to appeals from orders requiring hospitalization of a defendant for a competency examination under 18 U.S.C. 4241(b)). In addition, collateral order appeals may be further streamlined by requiring defendants to meet the normal requirements for a stay of the order permitting involuntary medication, including a likelihood of success on the merits. See Fed. R. App. P. 8; *Hilton* v. *Braunskill*, 481 U.S. 770, 776 (1987). In this case, in light of the important and unresolved legal issues, the government did not oppose stays of the orders of the magistrate judge, the district court, and the court of appeals. In future cases, assuming that this Court were to approve treatment orders and to lay down guidelines for the showing that must be made, stays (which delay resolution of the criminal case

and may impair the defendant's course of treatment) will often be unwarranted. That would be particularly true if a defendant were to resist medication for the first time while the trial is in progress, thus disrupting ongoing proceedings. Cf. *Hilton*, 481 U.S. at 776 (noting that a traditional stay factor is "whether issuance of the stay will substantially injure the other parties interested in the proceeding").

Finally, there is no reason to think that collateral order appeals in future cases will place an unwarranted burden on federal appellate courts or will unduly disrupt criminal prosecutions. The universe of patients who are treated involuntarily with antipsychotic medication is relatively small. As the government noted, U.S. Br. 27-28, in a recent 12-month period, of the 285 patients treated after hospitalization for incompetence to stand trial under 18 U.S.C. 4241(d), nearly 80% accepted treatment voluntarily, and it does not appear that, of the remaining 59 patients who were treated involuntarily, any large number sought judicial review. The fact that antipsychotic medication is in the medical interest of those patients no doubt accounts for the limited number of legal appeals pursued, and that consideration should further reduce any concerns about recognizing collateral order appeals in this context. Cf. *Behrens*, 516 U.S. at 310 (noting that successive qualified immunity appeals "seem to be a rare occurrence").

CONCLUSION

The court of appeals had jurisdiction under 28 U.S.C. 1291 and the collateral order doctrine to the extent that petitioner challenges the order of the district court authorizing involuntary medication with antipsychotic drugs on substantive due process and First Amendment grounds, and this Court has jurisdiction under 28 U.S.C. 1254(1).

Respectfully submitted.

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